

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HEALTH**

**In the Matter of an Administrative Penalty Order FINDINGS OF FACT,
Issued to Ronald Gustafson and CONCLUSIONS OF LAW
Heritage Homes, Inc., dated February 15, 1996 AND RECOMMENDATION**

This matter was heard before Administrative Law Judge Dennis J. Seitz(ALJ) on 5/16/96 in Room 704 of the Government Services Center, Duluth, Minnesota. The record closed 6/24/96 when the last post-hearing submission was received in the office of the ALJ.

Paul G. Zerby, Assistant Attorney General, 525 Park street, Suite 500, St. Paul MN 55103-2106, appeared on behalf of the Department of Health(Department). Ronald Gustafson appeared in person and by counsel, John H. Hendricks, 312 Board of Trade Building, Superior WI 54880-2588, who also appeared on behalf of Heritage Homes, Inc. Ronald Gustafson and Heritage Homes, Inc. will be referred to collectively as petitioner.

This report is a recommendation, not a final decision. The Commissioner of Health will make the final decision, after a review of the record, which may adopt, modify or reject these Findings of Fact, Conclusions of Law and Recommendation. Pursuant to MSA 14.61, the final decision of the Commissioner shall not be made until this report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this report to file exceptions and present argument to the Commissioner. Parties should contact Anne M. Barry, Commissioner, Department of Health, 121 East 7th Place, P.O. Box 64975, St. Paul MN 55164-0975, (612) 215-0821, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF THE ISSUE

The issue in this case is whether a forgivable administrative penalty order(APO), requiring violations of the well code to be corrected, assessed against Ronald Gustafson and Heritage Homes, Inc. in an order dated February 15, 1996, for failure to comply with MSA 103I or Minnesota Rules, Ch. 4725, should be upheld against petitioner.

Based upon the entire record in this matter, the ALJ makes the following:

FINDINGS OF FACT

1. **Heritage Homes, Inc., a building contractor located in Superior WI, is owned by Ronald Gustafson.**
2. **Thomas Reistad is an employee of petitioner.**
3. **Gerald and Catherine Kortesmaki(Kortesmaki) contracted with petitioner to construct a home for \$117,081 on land owned by them, on which an existing home existed, during the spring and/or summer of 1995. The subject well served the existing home and was to serve the new home.**
4. **Notwithstanding Gustafson's denial, petitioner was the general contractor for purposes of the contract with Kortesmaki, which allowed petitioner to hire all subcontractors needed to fulfill the contract including excavating and foundation. The contract also allowed Kortesmaki to make arrangements for subcontractors, pre-approved by petitioner, or to pay an additional amount to make such arrangements.**
5. **Excavation work was done by Walter Carter as a subcontractor to petitioner; Carter was suggested to petitioner by Kortesmaki because Carter was already on site with his equipment, working for Kortesmaki, under separate contractual arrangement, on a mound-style septic system that was required whether or not Kortesmaki built a new home or continued living in the existing home. The ALJ specifically finds Carter to be petitioner's subcontractor for excavation, notwithstanding petitioner's denial of the relationship and notwithstanding the circumstances surrounding Carter's being hired to do the excavation work.**
6. **Foundation work on the home was done by KRA Builders(KRA), jointly owned by Keith Anderson and John Urbaniak, as subcontractor to petitioner, a relationship acknowledged by petitioner and KRA.**
7. **The site for the house was staked twice, in early May 1995 by Reistad and Anderson, with Kortesmaki and Carter present, and several weeks later by Anderson, with Kortesmaki and Carter again present. Following the second staking, Carter asked Anderson to remain on-site while he excavated, but Anderson declined. Each of these stakings resulted in the house being sited in the same location which was at least four feet and no more than ten feet from the well in question.**
8. **The relation of the well to the foundation was occasioned by concern by Kortesmaki over whether the visible portion of the wellhead would obstruct traffic in the driveway and not over anyone's concern about regulations controlling distances.**
9. **The second staking was apparently necessitated by Carter inadvertently knocking over some of the stakes while he worked on the septic system.**

10. On 5/31/95, Urbaniak appeared on site, intending to begin the foundation work. Carter was not yet finished with the excavation work and Urbaniak did some staking of the house in the garage area and checked squaring of some of the corners.

11. Kortesmaki was present when Urbaniak staked and squared things up and he inquired concerning the location of the well and was told by Urbaniak that it was all right.

12. Following the completion of the excavation, the foundation work followed in the trenches as completed by Carter during Urbaniak's presence.

13. The well is located approximately 17 inches from the foundation of the finished house and is located approximately 6 inches from the roof overhang as measured by well inspector Sutliff at Kortesmaki's request.

14. Although petitioner sometimes applied for appropriate building permits for its projects, in this case Kortesmaki applied for the building permit from the township which required a sketch of the location of the building on site but did not require detailed information concerning siting.

From these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Health have jurisdiction in this matter pursuant to MSA 144.989 - 144.993 and 14.50.

2. The Notice of and Order for Expedited Administrative Hearing was properly issued and served and all other procedural and substantive requirements have been complied with.

3. The mere act of applying for a building permit, with or without considering a layman's concern for the well location, in no way placed on Kortesmaki responsibility for complying with well codes, building codes, electrical codes, plumbing codes or any other applicable codes. Such compliance falls on the professionals involved and ultimately on the general contractor.

4. Petitioner is solely responsible for the admitted violation of Minnesota Rule 4725.2185 which occurred in the building of the Kortesmaki home.

5. An Administrative Law Judge may not recommend a change in the proposed penalty and/or its required corrective action unless the Administrative Law Judge determines the penalty to be unreasonable.

6. Because the Department of Health is in a position superior to that of the Administrative Law Judge vis-a-vis determination and weighing of health and/or

environmental risk(s), the proposed penalty and its required corrective action are not unreasonable.

Based on these Findings of Fact and Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

It is respectfully recommended that the Commissioner uphold the Administrative Penalty Order issued to Petitioner.

Dated: _____

Administrative Law Judge

MEMORANDUM

Petitioner, while admitting the Kortesmaki home ultimately was sited in violation of Minnesota Rule 4725.2185, argues that Kortesmaki is the responsible party, due both to action and/or omission and Minnesota Rule 4725.0200. Neither reason is convincing.

Petitioner also argues that the required correction is excessive under the circumstances. But, even if the ALJ agreed in principle with that argument, it is not within the ALJ's purview to recommend a different mode of correcting what is at least a potential threat to health and/or the environment.

Petitioner also contends that inclusion in final argument by the Assistant Attorney General of the complete text of the contract for construction of the home, instead of the first page as presented at the hearing, somehow gives the ALJ information that he is not entitled to have. Attorney for petitioner, as an officer of the court, should have sought to correct the inadvertent admission into evidence of a partial document rather than to present the disingenuous argument against its consideration. Although the ALJ used the full contract minimally in reaching his decision, as soon as he looked at the partial contract he would have requested that the parties furnish the complete text, a request that petitioner's counsel could have carried out since his client(s) were party(ies) to it.

(This recommendation was issued 7/18/96)